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BRIEF FOR RESPONDENT IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 270

GREENWOOD AND MAJESTIC CONSTRUCTION CO., *Petitioner*

v.

DISTRICT OF COLUMBIA, *Respondent.*

On petition for a Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether, under the provision of a District of Columbia Government construction contract requiring that *all* disputes arising under the contract be presented to an administrative tribunal for resolution, a contractor must, as a condition to judicial relief, submit to such administrative tribunal a dispute respecting the application of a liquidated damage clause of the contract.

ARGUMENT

Because petitioner failed to pursue and exhaust the administrative remedy provided by the contract, the court below properly refused judicial relief.

Petitioner presents no substantial and important question calling for review by this Court. The decision of the Court of Appeals, rather than being in "direct conflict with decisions of this Court," is in strict conformity with the principles set forth by this Court in its opinions construing government construction contracts.

Article 15 of petitioner's contract with the District of Columbia provides, in part, that:

> " * * * *all* disputes concerning questions arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within thirty (30) days to the Contract Appeals Board * * * ." (Emphasis supplied; J. A. 12.).

The contract provides further that "[t]he Contractor shall pay to the District of Columbia as fixed, agreed, and liquidated damages, the sum of $250 for each calendar day of delay in completion of the contract * * * *" (J. A. 11).

It is undisputed that petitioner failed to complete the contract within the time specified and, as provided by the contract, liquidated damages were assessed.

Instead of submitting to the District of Columbia Contract Appeals Board, as required by Article 15, its contention that, under the circumstances involved, the assessment of liquidated damages constitutes a penalty, petitioner commenced in the United States District Court an action to recover the amount of liquidated damages withheld by the District of Columbia from its final payment to petitioner.

In an effort to overcome the mandatory effect of Article 15, petitioner places a "breach of contract" label on the dis-

pute, and asserts that, accordingly, it does not concern any question "arising under" the contract. In *United States v. Utah Construction and Mining Co.*, ——— U. S. ———, 16 L. Ed. 2d 642, 659, this Court recognized that "[a]ny claim, whether within or without the disputes clause, can be couched in breach of contract language," but held that the contractural and statutory scheme cannot be avoided by such an exercise of semantics.

Here, the dispute, involving as it does the application of a particular provision of the contract, unquestionably "arises under" the contract. As petitioner concedes, the validity of the assessment of liquidated damages in accordance with the contract depends upon whether, " * * * under the circumstances and expectations of the parties existing at the time of execution it appears that the provision is a reasonable protection against uncertain future litigation * * * ." *Davy* v. *Crawford*, 1945, 147 F. 2d 574, 575, 79 U. S. App. D. C. 375, 376. Petitioner claims that it was not contemplated by the District of Columbia, at the time the contract was executed, that the construction of other segments of the sewer (without which petitioner's segment could not be used) would be completed prior to the time petitioner actually completed its segment. Obviously, however, this alone, even if true, would not require a finding that the assessment of liquidated damages constitutes a penalty.[1] Other factors, such as the anticipated cost to the District of Columbia of retaining, during the period of delay, outside consultants and inspectors on the job, as well as the cost of administrative overhead (J.A. 14-19), would also have to be considered.

[1] Petitioner states that respondent conceded before the trial court that the assessment of liquidated damages constitutes a penalty. Respondent's position was that, in considering whether petitioner's failure to appeal to the Contract Appeals Board deprived the court of jurisdiction to grant the relief sought in the complaint, the question of whether the assessment of liquidated damages was or was not a penalty was immaterial and that, accordingly, for the purpose of its motion to dismiss only, respondent could concede that it was.

Had petitioner submitted to the Contract Appeals Board its dispute respecting the assessment of liquidated damages, and had the Board agreed that, under the circumstances involved, the assessment did, in fact, constitute a penalty, the Board could have granted petitioner complete relief. And this is so even though the dispute concerns questions of law as well as questions of fact. Many of the United States Contract Appeals Boards have granted relief under almost idenical circumstances. See *Standard Coil Products Company, Inc.*, 59-1 BCA[2] 9005, *Truax Machine & Tool Company*, 59-2 BCA 10,217; *Lee Moulding*, 61-1 BCA 15,469, 15,478, and *Refer Construction Co.*, 61-1, BCA 15,765.

Petitioner argues that "[t]he meaning or applicability of the disputes provisions of the standard form government contract should not vary depending upon whether the contract is one with the United States Government proper or with the District of Columbia." Respondent agrees, but says that there has been no showing of any variance. The contract in question, unlike many United States Government contracts, provides that *all* disputes, not just *factual* disputes, must be first submitted to the Contract Appeals Board for resolution. There is no pretense that the Board's decisions on *legal* questions are conclusive on the parties (*Kenny Construction Company* v. *District of Columbia*, 1959, 262 F. 2d 926, 105 U. S. App. D. C. 8) but the agreement of the parties to submit such legal questions to the Contract Appeals Board is perfectly proper (*United States* v. *Moorman, et al.*, 1950, 338 U. S. 457) and the practice often obviates the necessity of court litigation.

CONCLUSION

It is respectfully submitted that petitioner has presented no substantial and important question calling for review

[2] Board of Contract Appeals Decisions, published by Commerce Clearing House, Inc.

by this Court and that its petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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